Supreme Court, U.S.
FILED
OCT 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

QUINCY CABLE TV, INC., *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENT QUINCY CABLE TV, INC. IN OPPOSITION TO PETITION

JOHN P. COLE, JR.*
DAVID M. SILVERMAN
COLE, RAYWID & BRAVERMAN
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 659-9750

Attorneys for Respondent Quincy Cable TV, Inc.

October 25, 1985

*Counsel of Record

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

Those Questions Presented by the Joint Petition are argumentative and evasive of the issues. The questions presented are:

1. Whether FCC regulations which, upon private-party demand, mandate distribution and exhibition of the programming and commercial advertising messages broadcast by designated television stations over respondent's cable television system, a causal effect of which is displacement and exclusion of other preferred, available communications sources and information, exceed the constraint imposed, or unlawfully abridge freedoms protected, under the speech and press clause of the First Amendment to the U.S. Constitution.

2. Whether FCC regulations which compel that respondent's cable television system, without compensation, dedicate a significant portion of its limited channel capacity and electronic distribution facilities to exhibition of the programming and commercial announcements of prescribed television broadcast stations, upon demand of the station licensees, constitute a taking of respondent's property in contravention of the due process clause of the Fifth Amendment to the U.S. Constitution.

The court below resolved the first Question in the affirmative and declined to address the second as then unnecessary to resolution of the case.

LIST OF PARTIES

Respondent here and a petitioner in the court below, Quincy Cable TV, Inc., is a corporation of the State of Washington, the stock of which is wholly owned by a husband and wife. Quincy Cable has no subsidiaries and its sole business is ownership and operation of a cable television system in the Town of Quincy, Washington.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	5
1. The Issue Of Constitutional Law Was Correctly Treated By The Court Below	5
2. There Are No Conflicting Decisions Rendered By Other Federal Courts On The Same Issue	9
3. The Agency That Promulgated The Must-Carry Rules Has Declined To Seek Review Of The Decision Of The Court Below	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES:	Page
Associated Press v. *United States*, 326 U.S. 1 (1944) ..	4
Black Hills Video Corp. v. *FCC*, 399 F.2d 65 (8th Cir. 1968)	10
Buckley v. *Valeo*, 424 U.S. 1 (1976)	7
Capital Cities Cable, Inc. v. *Crisp*, —— U.S. ——, 104 S.Ct. 2694 (1984)	11
Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94 (1973)	6, 7
FCC v. *Midwest Video Corp.*, 440 U.S. 689 (1979)	11
Fortnightly Corp. v. *United Artists*, 392 U.S. 390 (1968)	6
Home Box Office, Inc. v. *FCC*, 567 F.2d 9 (D.C. Cir.) (*per curiam*), *cert. denied*, 434 U.S. 829 (1977) ...	11
Lilly v. *United States*, 238 F.2d 584 (4th Cir. 1956)	6
Midwest Video Corp. v. *FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979).	10
National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943)	6
Preferred Communications, Inc. v. *City of Los Angeles*, 745 F.2d 1396 (9th Cir. 1985), jurisdictional statement filed No. 85-390 (Sept. 6, 1985)	10, 11
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969)	6
Tele-Communications of Key West, Inc. v. *United States*, 757 F.2d 1220 (D.C. Cir. 1985)	10
Teleprompter Corp. v. *C.B.S.*, 415 U.S. 394 (1974)	6, 9
Thomas v. *Collins*, 323 U.S. 516 (1945)	9
United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968)	11

Table of Authorities continued

	Page
Federal Communications Commission Regulations:	
47 C.F.R. § 76.209	8
47 C.F.R. § 76.57(a)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-502

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

QUINCY CABLE TV, INC., *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENT QUINCY CABLE TV, INC. IN OPPOSITION TO PETITION

Respondent Quincy Cable TV, Inc., owner and operator of a cable television system and the petitioner below in Case No. 83-1283, opposes the Joint Petition of National Association of Broadcasters, *et al.*

OPINIONS BELOW

Since the filing of the Joint Petition, the opinion of the court below has been reported in 768 F.2d 1434 (D.C. Cir. 1985).

STATEMENT OF THE CASE

Petitioners accord but one brief paragraph (Joint Petition, p. 6) to the cable television operations conducted by respondent Quincy Cable and altogether avoid the context in which the must-carry regulations of the Federal Communications Commission ("FCC") were applied by the agency to require full-time carriage of three commercial broadcast television stations licensed to Spokane, Washington in circumstances where Quincy Cable and those persons residing in the Town of Quincy, had expressed their preference for access to other, diverse communications over the cable system's limited distribution facilities. These missing facts will be helpful to the Court's appreciation of the issues.

Those brief facts relating to Quincy Cable are accurately set forth in the opinion of the court below (Slip Op., A., 26a-28a).[1] Quincy, a small town in rural Washington, lies equidistant between Seattle and Spokane being 125 miles from each, and well beyond the direct range of television stations broadcasting from either metropolitan city (Slip Op., A., 26a). Operating a cable television reception and distribution system of limited channel capacity, and serving less than 1000 cable subscribers, Quincy Cable sought to exercise its discretion, consistent with that expressed by its subscribers, to furnish access to a wider diversity of available in-

---

[1] References herein to "A." refer to the Appendices to petitioners' Joint Petition with the appropriate page identification. "Slip Op." refers to the opinion of the court below as reprinted in the Joint Petition. "Quincy" followed by a Roman numeral refers to one of the six decisions of the FCC, as reprinted in the Appendix to the Joint Petition, pp. 63a-132a.

formation. Specifically, Quincy Cable proposed to (i) retain carriage of three Seattle commercial network television stations to the west, (ii) delete reception of three duplicating network-affiliated stations broadcasting from Spokane to the east, and (iii) replace the then three vacated channels with three entirely new program services (Slip Op., A., 26a). The three Spokane stations, each the licensee of a VHF television channel, objected before the FCC asserting that the must-carry rules afforded them the right of mandated access to Quincy Cable's distribution lines for exhibition of their commercial speech product.[2]

The FCC held that none of the reasons proffered by Quincy Cable were sufficient to waive its mandatory carriage rules and denied the requested relief (*Quincy I*, A. 75a-77a). Quincy Cable, proceeding then for the first time by legal counsel, sought agency reconsideration both refining its prior factual reasons and making fundamental free speech and due process assertions under the First and Fifth Amendments to the U.S. Constitution claiming a prior restraint on its exercise of editorial discretion in the selection, organization

---

[2] The FCC's must-carry rule (47 C.F.R. § 76.57(a)) required cable television systems to carry certain stations "on request of the relevant station licensee" (A., 133a). Thus, the obligation to carry a particular station is invoked at the option of that station licensee, i.e., the rule delegates *discretion* to the licensee as to that speech to be distributed over the cable-television medium. A station licensee's entitlement to carriage is not dependent upon the content or quality of its programming. *See* Slip Op., A. 37a, n. 38 ("religious programming" entitled to must carry). And the rules "required carriage . . . irrespective of the number of must-carry channels already being transmitted, the degree of programming duplication or the channel capacity of a cable system" (*Id.*, A., 13a).

and presentation of information to be distributed over its medium, and a devaluation of its business resulting from compelled occupation of its limited distribution capacity with unwanted programming resulting in subscriber dissatisfaction causing a loss of revenue (*Quincy VI*, A., 128a).[3]

The FCC rejected each and every argument advanced by Quincy Cable, holding, *inter alia*, that stations entitled to must-carry status need show no effort to serve the needs of the cable community (*Quincy II*, A. 82a); "that certain program services which Quincy now carries . . . may allegedly be more popular than the Spokane affiliates is not ground for waiver" (*Quincy VI*, A. 132a); that "[n]either are we persuaded by Quincy's contentions that its obligations to comply with the mandatory signal carriage rules is vitiated because it already carries three network stations on its system, because its subscribers may receive the Spokane translator stations over-the-air on their UHF terminals, or because its subscribers allegedly have no interest in viewing the Spokane signals;"[4] and "that our signal carriage policy provides that mandatory signals have carriage priority over non-mandatory signals" (*Quincy IV*, A., 101a-102a).[5] And

---

[3] Cable television systems, like any media business, operate at the economic endorsement of the consumer.

[4] By mandating carriage of *duplicating* programming over cable-system lines, the delivery capacity of which is finite, the FCC rule militates *against* "the widest possible dissemination of information from diverse and antagonistic sources." *Cf. Associated Press* v. *United States*, 326 U.S. 1, 20 (1944).

[5] During the course of the proceedings conducted before the FCC (November 1979 - February 1983), Quincy Cable had expanded the

because of its failure immediately to distribute the Spokane stations as had been directed by an *employee* of the FCC, the FCC imposed a forfeiture in the sum of $5,000 on Quincy Cable (Slip Op., A. 27a). The Town of Quincy was an intervenor in the court below supporting the First Amendment position taken by Quincy Cable.

REASONS FOR DENYING THE WRIT

1. The Issue Of Constitutional Law Was Correctly Treated By The Court Below

The subject Petition for Writ of Certiorari is jointly filed on behalf of numerous intervenors below, all of whom are either licensees or representatives of commercial television broadcast stations that benefit financially from cable carriage pursuant to the FCC's must-carry rules.[6] The fundamental flaw underlying the Joint Petition is that it assumes that broadcast licensees, as First Amendment speakers, are entitled to

---

delivery-capacity of its cable system beyond the original 12 channels and offered to carry the three Spokane station signals over the system's "Tier II", an optional level of service to which all of the system's users did not elect to subscribe (Slip. Op. A. 28a n. 28; *Quincy VI*, A. 127a). The FCC, rejecting any such resolution, held that stations entitled under the rule to must-carry status must be carried "on a cable system's basic tier of service" (i.e., that tier to which *all* system users must subscribe). *Quincy VI*, A., 130a. Thus, the rule not only mandates carriage of specified sources but further dictates the manner or order of presentation over the cable medium.

[6] The FCC, the agency that promulgated and enforced those rules, and a respondent below, is not seeking further review of the decision below. Nor is the United States, the other respondent below, a party here. *See* Part 3, *infra*.

uniquely favorable First Amendment treatment because of their status as "privileged occupants of a physically scarce resource," (Slip Op., A., 31a-32a), *i.e.,* the broadcast spectrum. That underlying assumption is wrong; and, indeed, it is the converse theory which this Court has consistently applied. A broadcaster's privileged occupancy of the scarce, limited spectrum justifies and excuses a *diminished* First Amendment status, since "[i] is the right of the viewers and listeners, not the right of broadcasters, which is paramount." *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 390 (1969).[7]

See National Broadcasting Co. v. *United States,* 319 U.S. 190, 226-27, 2140-14 (1943); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 101 (1973) ("Because the broadcast media utilize a valuable and limited public resource there is also present an unusual order of First Amendment values.") "[A]dvantages [of a broadcast license] are the fruit of a preferred position conferred by the Government" (*Red Lion Broadcasting Co., supra,* 395 U.S. at 400) requiring a balancing of the licensee's rights as a "public trustee" (*CBS, supra,* 412 U.S. at 118).

---

[7] This Court, albeit in a copyright context, has functionally equated cable television reception and distribution of broadcast signals to that of a television viewer. *Fortnightly Corp.* v. *United Artists,* 392 U.S. 390, 400 (1968) ("The function of CATV systems has little in common with the function of broadcasters. . . . CATV systems receive programs and carry them by private channels to additional viewers" (footnotes omitted)). *See also, Teleprompter Corp.* v. *C.B.S.,* 415 U.S. 394, 408 (1974); and *See Lilly* v. *United States,* 238 F.2d 584, 587 (4th Cir. 1956), (cable service is "a mere adjunct of the television receiving set with which it was connected . . .").

That position advanced below, and now here, by the broadcasting interests is the direct opposite of the "scarcity" theory. For petitioners contend that by virtue of their special status as privileged broadcast licensees entitled to speak via the public's scarce airwaves, they thereby are conferred with a superior First Amendment right *vis-a-vis* that of the viewer or the ordinary citizen, *viz.*, the right to demand that their speech be governmentally preferred over that of all other First Amendment speakers.[8] We are aware of no precedent of this Court condoning a systematic prioritising by government of, or between, fully protected speech sources.[9] *Compare Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .").[10]

---

[8] Slip Op., A., 37a ("the more certain injury stems from the substantial limitations the rules work on the [cable] operator's otherwise broad discretion to select the programming it offers its subscribers").

[9] The FCC's must-carry mentality, which explicitly "provides that mandatory signals have carriage priority over non-mandatory signals" (*Quincy IV*, A., 102a), is unique and without parallel to any other media application or context.

[10] That case most on point is *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94 (1973), where the Court, at the instance of the broadcasting industry, firmly established the principle of the licensee's "right to exercise editorial judgment" (412 U.S. at 111) and to accord or deny access to its facilities "based on its own journalistic judgment of priorities and newsworthiness" (412 U.S. at 118). Ironically, the broadcaster petitioners here would deny Quincy Cable that same measure of editorial autonomy in selecting those communications for distribu-

A government regulation which, without subtlety, enables one entrepreneur, by simple demand and without charge, to commandeer the facilities of another for purposes of distribution and publication of *commercial* speech would seemingly create presumptive problems under both the First and Fifth Amendments to the Constitution.[11] The Joint Petition does not discuss these fundamental concerns inherent to the "must carry" scheme.[12]

---

tion over its wire-line facilities. Where any cable operator *originates* programming it is subject to the identical "fairness" requirements pertaining to a broadcast licensee (47 C.F.R. § 76.209).

[11] *See, e.g.*, Slip Op., A., 37a, n. 37 (applying the must-carry scheme to print media).

[12] Amici here, condemning the opinion below, express the fear that Quincy Cable, or cable systems in generality, are made First Amendment "censors" or "gatekeepers" of that information to be distributed over cable-system lines. On analysis this contention proves a red herring. First, Quincy Cable's services furnish subscribers access to some 12 televison broadcast stations (*Quincy IV*, A., 127a) over which independent signal-sources it exercises *no* power of program supervision or alteration. Further, subscribers obtain access to a wide variety of additional non-broadcast entertainment and information sources (*Id.*). Without Quincy Cable's services, residents of Quincy would be restricted to video access to only the Spokane translator stations (Slip Op., A., 26a, n. 25). And, thus, Quincy Cable is a major contributor to diversity of communications within the community. Admittedly, Quincy Cable, like any media editor (e.g., the television networks or the *New York Times*), exercises substantial discretion in the selection and presentation of those sources for containment in its communications package. The intent and effect of the First Amendment, however imperfect, is to bar *government*, and therefore the FCC, from making those judgments. "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech and re-

Licensees of broadcast television stations, like teachers, peace officers, sanitation workers and publishers, generally make a valuable contribu on to the commonweal. But such licensees, however uniquely privileged and economically advantaged by their governmental grant, do not constitute a media elite elevated above the more pedestrian concerns or principles of the Constitution. The particular speech of a broadcaster, commercial or otherwise, is entitled to no more protection or governmental promotion under the First Amendment than that accorded to all speakers. The fundamental fallacy of the must-carry rule, like those arguments of the joint petitioners, is the failure to recognize, or even to consider, these bedrock principles.[13]

2. There Are No Conflicting Decisions Rendered By Other Federal Courts On The Same Issue

Contrary to the assertions of petitioners, there is no conflict among the circuits nor is there any Supreme

---

ligion." *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

[13] Joint petitioners finally urge that the D.C. Circuit's "cavalier dismissal of the interrelationship of . . . copyright and regulatory issues" (Joint Pet., p. 24) somehow misled the court in its First Amendment analysis. But as this Court has observed:

> The FCC has consistently contended that it is without power to alter rights emanating from other sources, including the Copyright Act . . . This position is consistent with the terms of the Communications Act of 1934, the source of the Commission's regulatory power. . . .

Teleprompter Corp. v. *C.B.S.*, 415 U.S. 394, 406 n. 11 (1974). The issues before the court below concerned solely an FCC regulation and its administration by the agency; and such questions do not entail considerations of a copyright nature.

Court precedent in conflict with the opinion below. The Eighth Circuit's opinion in *Black Hills Video Corp.* v. *FCC,* 399 F.2d 65 (8th Cir. 1968), petitioners' strongest case in support of their circuit-conflict argument, was repudiated by that same court ten years later. The Eighth Circuit had upheld the FCC's must-carry rules in *Black Hills* on the grounds that "[t]he Commission's effort to preserve local television by regulating CATVs has the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations." 399 F.2d at 69. However, in *Midwest Video Corp.* v. *FCC,* 571 F.2d 1025, 1056 (8th Cir. 1978), *aff'd on other grounds,* 440 U.S. 689 (1979), that same court stated:

> [W]e have seen and heard nothing in this case to indicate a constitutional distinction between cable systems and newspapers in the context of the government's power to compel public access.
>
> If the Commission has any authority to intrude upon the First Amendment rights of cable operators, that authority, as above indicated, is less, not greater than its authority to intrude upon the First Amendment rights of broadcasters.

In a footnote, the Eighth Circuit limited *Black Hills* to its facts. 571 F.2d at 1054, n. 71.[14] Indeed, the opinion below is in complete harmony with the Eighth Circuit's later *Midwest Video* opinion, as well as with the D.C. Circuit's own opinions in *Tele-Communcia-*

---

[14] *See also Preferred Communications, Inc.* v. *City of Los Angeles,* 754 F.2d 1396, 1404 (9th Cir. 1985), jurisdictional statement filed No. 85-390 (Sept. 6, 1985) ("*Black Hills Video,* therefore, is a doubtful precedent today").

tions of Key West, Inc. v. *United States,* 757 F.2d 1220 (D.C. Cir. 1985) and *Home Box Office, Inc.* v. FCC, 567 F.2d 9 (D.C. Cir.) (*per curiam*), *cert. denied,* 434 U.S. 829 (1977), and with the Ninth Circuit's opinion in *Preferred Communications, Inc.* v. *City of Los Angeles, supra.* In short, there is no arguable conflict among the circuits.

Nor is there any arguable Supreme Court precedent upholding the constitutionality of the must-carry rules. Although this Court has upheld the FCC's *jurisdiction* over cable television in *United States* v. *Southwestern Cable Co.,* 392 U.S. 157 (1968), and its *preemption* of certain state regulation in *Capital Cities Cable, Inc.* v. *Crisp,* —— U.S. ——, 104 S.Ct. 2694 (1984), it has never purported to consider the constitutionality of the cable must-carry rules.[15] To the extent that a First Amendment challenge to cable regulations has been discussed at all, the issue was termed "not frivolous" by this Court in *FCC* v. *Midwest Video Corp.,* 440 U.S. 689, 709, n. 19 (1979).

There is no dispute here as to the FCC's jurisdiction over cable or its authority to preempt state regulation of signal carriage rules. The *only* decision made by the court below is that the current must-carry rules "are insufficiently tailored to justify their substantial interference with First Amendment rights" (Slip Op., A., 60a). There is no surviving judicial precedent in conflict with this holding. And the Joint Petition does not question such finding. *See infra,* note 17.

---

[15] In *Capital Cities,* this Court explicitly declined to consider the claim that the FCC's signal-carriage rules violate the First Amendment rights of cable operators (104 S.Ct. at 2701, n. 6). Similarly, the Court in *Southwestern* noted the absence of a constitutional claim (392 U.S. at 181).

3. The Agency That Promulgated The Must-Carry Rules Has Declined To Seek Review Of The Decision Of The Court Below

Neither of the respondents below, the FCC or the United States, is seeking relief here. In accepting the decision of the court below, the FCC, by a majority of its commissioners, formally stated:

> The *Quincy* decision focused very directly on the First Amendment issues involved. Because the constitutional analysis as to cable represents a positive step toward recognizing full First Amendment protection for all forms of electronic media, we will not challenge it.[16]

Thus, the FCC, which vigorously defended its rules below, now fully acquiesces in the constitutional analysis and findings of the court below. Indeed, the FCC has decided not even to attempt on its own "to recraft the rules in a manner more sensitive to the First Amendment concerns," despite the court's explicit invitation to the agency to do so (Slip Op., A., 60a). In response to such invitation, the FCC stated, "we believe that the better course is to seek an equitable realigning of free marketplace forces rather than another false equilibrium of intrusions on the rights of cable operators, broadcasters, and copyright holders" (A., 142a).[17]

---

[16] "Commission Will Not Appeal Quincy Cable TV v. FCC," FCC Public Notice, August 2, 1985 (A., 138a). Thereafter, the FCC announced on September 10, 1985 that the must-carry rules were "vacated" (A., 142a).

[17] The FCC is, however, currently in the process of accepting petitions for rulemaking proposing adoption of new must-carry rules. Indeed, eight of the joint petitioners here *subsequently* filed

By its inaction and proclaimed rationale, the FCC, once the proponent of and strong advocate for the must-carry rules, acknowledges that such rules were overbroad, economically unjustified[18] and, in their present form, violative of the First Amendment freedoms of cable operators, television viewers and other programming sources seeking cable access for distribution of their product. That commercial broadcasters, the economic beneficiaries of these regulatory excesses, want the FCC to reestablish those protectionist rules is not surprising, since "[t]heir very purpose is to bolster the fortunes of local broadcasters even if the inevitable consequence of implementing the goal is to create an overwhelming competitive advantage over cable programmers" (Slip Op., A., 36a). Loss of a mere "competitive advantage" does not warrant grant of the requested Writ.

Joint petitioners here, mere intervenors in the court below in support of the FCC's position, are in the

---

with the FCC on October 4, 1985 their "joint petition for rulemaking" urging, *inter alia*, that the FCC undertake rulemaking "contemplating adoption of new, tailored rules to replace its recently vacated 'must carry' rules." Joint petitioner here, Association of Independent Television Stations, Inc., filed independently with the FCC on October 4, 1985 its "petition for rulemaking" seeking "regulation of cable television carriage of television broadcast signals after the court's action in *Quincy Cable TV, Inc.* v. *FCC*, . . .". We urge that any redress to which petitioners may be entitled from the effects of the decision below is now more appropriately addressed in the context of agency rulemaking—a concept in which petitioners seemingly now concur.

[18] *See* Slip Op., A., 16a-18a ("Commission found that its general economic analysis had failed to substantiate the intuitive fears on which the rules had been premised since the mid-1960's").

peculiar posture of urging the Court to order that the government, not here a party, reissue rules, which rules have been "vacated" (*supra,* note 15) by uncontested agency action with the explicit acknowledgment that they were unconstitutional. As former third-party beneficiaries of the now-vacated rules, joint petitioners have no power *independent of appropriate FCC action* to effect or urge reinstatement of the rules in question. If joint petitioners have any remedy at all, their forum lies more appropriately in the now on-going agency rulemaking (*see supra,* note 17).

The quarrel of joint petitioners is not with the judgment of the court below but rather with the FCC which, without objection from any quarter, acquiesced in the court's mandate by rescinding the rules in question. Without a rule, without any rationale for entitlement to must-carry benefits independent of the former rule, and without any right to speak here for the FCC or to maintain or rely upon a regulation which the agency has formally vacated, joint petitioners have no case. The fact is that the primary parties below (both petitioners and both respondents) now concur in the judgment below.

CONCLUSION

The Joint Petition should be denied.

Respectfully submitted,

JOHN P. COLE, JR.*
DAVID M. SILVERMAN
COLE, RAYWID & BRAVERMAN
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 659-9750

Attorneys for Respondent
Quincy Cable TV, Inc.

October 25, 1985

**Counsel of Record*